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April 20, 2020

VIA FOIA ONLINE

Regional Freedom of Information Officer
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3507

RE: FOIA Request Regarding Attached Memorandums and Transmittal Documents

To Whom This May Concern:

This is a request for public records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as implemented by the Environmental Protection Agency ("EPA") at 40 C.F.R. Part 2.

Request

This request seeks all copies of the two attached memorandums and corresponding transmittal documents in the possession of EPA Region 5's Office of Water, Office of Enforcement, and/or Office of Regional Counsel.

Please contact the undersigned if the associated search and duplication costs are anticipated to exceed \$50.00. If the requested documents are withheld based upon any asserted privilege, please identify the basis for the non-disclosure.

If you have any questions regarding this request, please do not hesitate to contact this office so as to ensure that only the necessary documents are duplicated.

Respectfully,

//s/ Erin Thomas
Erin Thomas

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Attachment 1 – “Applicability of *Iowa League* decision to EPA permitting” Memorandum


MEMORANDUM

SUBJECT: Applicability of *Iowa League* decision to EPA permitting determinations

FROM: Andrew D. Sawyers, Director
Office of Wastewater Management

TO: Regional Water Permits Division Directors, Regions 1 – 10

(b) (5) (ACP), (b) (5) (DPP)



Before the court in *Iowa League* were EPA responses to two letters from a United States Senator. The letters explained how EPA interpreted its bypass regulation with respect to specific factual circumstances. EPA stated that a facility that diversion of flow after primary treatment to an ACTIFLO unit was a prohibited bypass that could not be approved by the permit writer without meeting the conditions set forth in 40 C.F.R. § 122.41(m), a required condition of every NPDES permit. Because the flows would not be sent to a secondary treatment unit, then the flow was “diverted” from the secondary treatment component of the treatment system and thus a prohibited bypass.

1. Background

In *Iowa League*, the court reviewed two EPA letters and determined that the letters had promulgated two new rules regarding mixing zones and “blending.” The court vacated the rules because they had been promulgated without following notice and comment procedures required under the Administrative Procedure Act (APA). In addition, the court determined that, even if the EPA had followed APA procedures, it lacked statutory authority to promulgate the new “blending rule” concerning application of the bypass regulation in the factual circumstance described in the letters. *Iowa League v. EPA*, 711 F.3d 844 (8th Cir. 2013), rehearing denied (July 30, 2013).

"Is the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment subject to a "no feasible alternatives" demonstration?"

Yes. The NPDES regulations define bypass as the intentional diversion of waste streams from any portion of a treatment facility. In general, flows diverted around biological treatment units would constitute a bypass regardless of whether or not the diverted flows receive additional treatment after the diversion occurs. The one exception to this would be if the diverted flow is routed to a treatment unit that is itself a secondary treatment unit. In this context, EPA considers treatment units that are designed and demonstrated to meet all of the effluent limits based on the secondary treatment regulations to be secondary treatment units. Based on the data EPA has reviewed to date, ACTIFLO systems that do not include a biological component, do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133, and hence are not considered secondary treatment units. Wastewater flow that is diverted around secondary treatment units and that receive treatment from ACTIFLO or similar treatment processes is a bypass, and therefore subject to the "no feasible alternatives" demonstration in the "bypass" provision at 40 CFR 122.41(m)(4). In certain circumstances, the EPA supports the use of these types of high rate treatment technologies to provide treatment during wet weather conditions. For this reason, the Agency will continue to explore in what circumstances use of these technologies is consistent with a determination that there are "no feasible alternatives" to an anticipated bypass, and where it would be appropriate to approve in a permit the use of such units."

(b) (5) (DPP), (b) (5) (ACP)

"The effect of this letter is a new legislative rule mandating certain technologies as part of the secondary treatment phase. If a POTW designs a secondary treatment process that routes a portion of the incoming flow through a unit that uses non-biological technology disfavored by the EPA, then this will be viewed as a prohibited bypass, regardless of whether the end of pipe output ultimately meets the secondary treatment regulations.

The EPA's new blending rule further conflicts with the secondary treatment regulations because the EPA has made clear that effluent limitations apply at the end of the pipe unless it would be impractical to do so. *40 C.F.R. § 122.45(h)*. There is no indication that the secondary treatment regulations established situations in which it would be impractical to apply effluent limitations at the end of the pipe or otherwise altered the application of this default rule. *See 40 C.F.R. § 133.100-102*. But the blending rule applies effluent limitations within facilities' secondary treatment processes. The September 2011 letter rejected the use of ACTIFLO because these units 'do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133.' If streams move around traditional biological secondary treatment processes and through a non-biological unit that 'is itself a secondary treatment unit,' then the system would not need to meet the restrictive no-feasible-

alternatives requirement. In other words, under the September 2011 blending rule, if POTWs separate incoming flows into different streams during the secondary treatment phase, the EPA will apply the effluent limitations of the secondary treatment regulations to each individual stream, rather than at the end of the pipe where the streams are recombined and discharged." *Id.* at 876.


c. The Eighth Circuit's decision

(b)(5) Attorney-Client, (b)(5) Deliberative Process

"The EPA would like to apply effluent limitations to the discharge of flows from one internal treatment unit to another. We cannot reasonably conclude that it has the statutory authority to do so Therefore, insofar as the blending rule imposes secondary treatment regulations on flows within facilities, we vacate it as exceeding the EPA's statutory authority."

Id. at 877-78. **(b)(5) Attorney-Client, (b)(5) Deliberative Process**

(b) (5) (ACP), (b) (5) (DPP)



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Attachment 2 – “Applicability of the Iowa League of Cities Decision to National Pollutant Discharge Elimination System (NPDES) permit requirements for blended effluent at publicly owned treatment works” Memorandum

MEMORANDUM

SUBJECT: Applicability of the Iowa League of Cities Decision to National Pollutant Discharge Elimination System (NPDES) permit requirements for blended effluent at publicly owned treatment works (POTWs)

FROM: Andrew Sawyers, Director
Office of Wastewater Management

TO Regional Water Division Directions, Regions 1-10

(b)(5) DPP, (b)(5) ACP



(b)(5) DPP, (b)(5) ACP



(b)(5) DPP, (b)(5) ACP

